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CLUB
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April 25, 2008

Mayor Susan Golding, Chair, MLPA Initiative
Melissa Miller-Henson, MLPA Initiative
MLPAComments@resources.ca.gov Melissa@resources.ca.gov

Re: Drakes Bay Oyster Company (DBOC)

Dear Mayor Golding and Ms Miller-Henson:

The Sierra Club requests a copy of the Attorney General's letter submitted in the testimony of William Wigert at the 4/22/08 MLPA Hearing. We also wish to make clear that Mr. Wigert, who represented himself at the hearing as an attorney for the Sierra Club, is NOT representing the Sierra Club or the Sierra Club's position regarding DBOC.

Mr. Wigert's testimony was that the Attorney General stated that "oysters are fish under the state constitution" and therefore this proves that DBOC is under the primary jurisdiction of the state Department of Fish and Game (DFG). We disagree, as does DFG.

The attached DFG letter clearly shows that when the state granted the bottomlands and waters of Drakes Estero to the National Park Service (NPS), it also granted primary jurisdiction over mariculture to NPS. Mr. Wigert has this DFG letter as well as one from the State Lands Commission (also attached) that both contradict his assertions. DFG clearly has some jurisdiction over mariculture in Drakes Estero, but it flows from and is subordinate to the primary jurisdiction of NPS. Mr. Wigert has the cart before the horse.

The DFG letter indicates that the right to collect wild shellfish or fish, which are public resources, is reserved by the constitution to the people of the state. However, DFG letter also clearly indicates that the right to collect cultivated oysters or farmed fish, which are private property, is not. The public has no constitutional right to take oysters from mariculture bags or salmon from fish pens without compensating the owners. Without this protection of private mariculture property, the very investment in mariculture that the state seeks to promote would not be possible. Mr. Wigert's testimony confuses this clear distinction between private property and public resources.

We appreciate the MLPA Blue Ribbon Task Force seeing through this confusion and including in its preferred MLPA alternative the statement that Drakes Estero should become a Marine Reserve "when feasible." This MLPA statement properly acknowledges that while the Estero is a vital marine nursery, mariculture in Drakes Estero is a federal issue. Thus it is entirely appropriate that the MLPA designate Drakes Estero as Marine Reserve only after DBOC's federal rights expire.

Sincerely,

Gordon Bennett, Sierra Club – Marin Group Conservation Chair



**DEPARTMENT OF FISH AND GAME
OFFICE OF THE GENERAL COUNSEL**

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<http://www.dfg.ca.gov>
(916) 654-3821

L425
02-106
May 15, 2007

Mr. Don Neubacher, Superintendent
Point Reyes National Seashore
Point Reyes Station, California 94956

Re: Drake's Bay Oyster Company

Dear Superintendent Neubacher:

The purpose of this letter is to memorialize the position of the Department of Fish and Game (Department) regarding the lease status of the above-referenced mariculture operation at Drakes Estero, within the Point Reyes National Seashore (PRNS). For the reasons discussed below, we conclude that the mariculture operation in question is properly within the primary management authority of the PRNS, not the Department.

By way of review, the leasing of state water bottoms at Drakes Estero dates to at least 1934. In 1965, the California Legislature granted to the United States, subject to certain limitations, "all of the right, title, and interest...to all of the tide and submerged lands or other lands beneath navigable waters" situated within the boundaries of the PRNS (Chapter 983, Statutes of 1965). The tidelands and submerged lands encompassed by this legislative grant include the leased state water bottoms. Consistent with article 1, section 25 of the California Constitution, this conveyance carried a reservation of the right to fish in the waters overlying these lands. Although the right to fish extends to both commercial and sport fishing, it does not extend to aquaculture operations. Regardless of whether its purpose is commercial or recreational, *fishing* involves the take of public trust resources and is therefore distinct from aquaculture, which is an agricultural activity involving the cultivation and harvest of private property (Fish and Game Code §§ 17, 15001, 15002, 15402). In November 1972, the Johnson Oyster Company (Johnson) conveyed its property to the United States, subject to a reservation of occupancy and use in the grant deed, which provided:

"Upon expiration of the reserved term, a special use permit may be issued for the continued occupancy of the property...provided, however, that such permit will run concurrently with and will terminate upon the expiration of State water bottom allotments assigned to the Vendor. Any permit for continued use will be issued in accordance with National Park Services regulations in effect at the time the reservation expires."

The reservation specifies a 40-year term and additionally requires, among other things, that Johnson comply with all applicable health and safety laws, and all rules and regulations of the National Park Service. This reservation expires in November 2012.

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ARNOLD SCHWARZENEGGER, Governor	
National Seashore	
MAY 18 '07	
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DRAKES ESTERO MARICULTURE

After that time, aquaculture operations must continue subject to a special use permit that would run concurrently with, and would terminate upon, the expiration of the assigned State water bottom allotments. Since such allotments are subject to a maximum lease term of 25 years, both the grantor and grantee apparently contemplated that the state water bottom leases then in effect could be renewed, and this was in fact done in 1979. In June 2004, the Fish and Game Commission (Commission) renewed the state water bottom lease for an additional twenty-five years, contingent on this reservation, and also required Johnson to comply "with all rules and regulations now or hereinafter promulgated by any governmental agency having authority by law..." In March 2005, the Commission authorized the assignment of the state water bottom lease to Johnson's successor, Drakes Bay Oyster Company.

The 2004 lease renewal is expressly contingent upon the aquaculture facility's compliance with the 1972 grant reservation and, after its expiration, with any special use permit that PRNS may issue in its discretion. The reservation requires compliance with all applicable health and safety laws and, specifically, with all rules and regulations of the National Park Service. Conversely, the renewal imposes an additional requirement of compliance with all other applicable laws, which reasonably includes those of the National Park Service and of PRNS in particular. For these reasons, we believe the mariculture operation in Drakes Estero is properly within the primary management authority of the PRNS, not the Department.

Should you or any of your staff require any additional assistance, please contact Senior Staff Counsel Joseph Milton, Office of the General Counsel, at (916) 654-5336 or jmilton@dfg.ca.gov.

Sincerely,

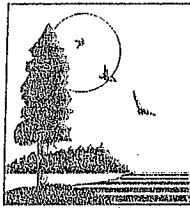
 CDD
for L. RYAN BRODDRICK
Director

cc: Mr. Ralph Mihan, Office of the Solicitor
U.S. Department of the Interior

Mr. Joseph Milton, Senior Staff Counsel
Department of Fish and Game

**CALIFORNIA STATE
LANDS COMMISSION**

JOHN GARAMENDI, *Lieutenant Governor*
JOHN CHIANG, *Controller*
MICHAEL C. GENEST, *Director of Finance*



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Voice Phone 1-800-735-2922

July 26, 2007

Mr. Michael Greenberg
Alliance for Local Sustainable Agriculture
P.O. Box 1316
Point Reyes Station, California 94956

Mr. Michael Greenberg

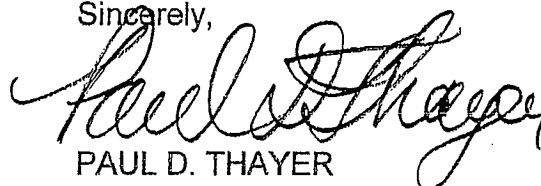
Thank you for taking the time to meet with me and my staff about oyster farming at Drake's Estero. It was a pleasure to meet you, the Lunneys and Mr. Wigert. We understand your concerns that there is a potential for the National Park Service to end oyster farming in Drake's Bay in the near future or in 2012 when Mr. Lunney's occupancy rights terminate under federal legislation creating the National Seashore.

We have reviewed land conveyances made by the Office of the Surveyor General and the Legislature as they pertain to the tide and submerged lands of the Estero and have concluded that they have conveyed out all of the State's real property interest except the mineral estate. This leaves the Commission with no jurisdiction over the bed of the Estero and precludes us from taking any action.

Secondly, we have taken a look at the constitutional "right to fish" reserved in the 1965 legislative grant. It is our belief that this reservation addresses fishing in the sense of taking or capturing fish and that it does not deal with aquaculture which comes under the jurisdiction of the Department of Fish and Game. It also apparent that the right to fish is not an absolute one and that it is susceptible to reasonable regulation.

Unfortunately, then, I do not believe there is anything the State Lands Commission can do to assist you in helping the Lunneys preserve their oyster farming operations. If you believe we can be of assistance in other aspects, please feel free to contact us.

Sincerely,


PAUL D. THAYER
Executive Officer